IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SCOTT LEE FEUER,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 03-3270-CM**
DR. WILLIAM B. MCCOLLUM, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the court on plaintiff Scott Lee Feuer's Motion for Reconsideration (Doc. 19), Motion for Default Judgment (Doc. 23), Motion for Default Judgment (Doc. 33), Motion for Hearing (Doc. 44), Motion for Sanctions (Doc. 45), and Motion to Strike Defendants' Reply to Motion to Dismiss (Doc. 45). Also before the court is defendants' Motion to Dismiss (Doc. 30). The court addresses each of the pending motions below.

I. Background

Plaintiff, a *pro se* inmate, brings this *Bivens* action, alleging denial of due process and deliberate indifference by prison staff to plaintiff's medical needs while plaintiff was incarcerated at the United States Penitentiary, Leavenworth, Kansas (USP Leavenworth), in violation of the Fifth and Eighth Amendments of the United States Constitution. Plaintiff contends that, despite the diagnosis of several serious medical conditions, defendant McCollum confiscated and cancelled all of plaintiff's medications, and defendant Tharp concurred with the actions of defendant McCollum. Plaintiff further alleges that defendant Conner (who was the Warden of USP Leavenworth at that time) and defendant

Hershberger (the Regional Director) acquiesced in the actions of the medical officers. Plaintiff contends that he has suffered irreparable harm as a result of the deprivation of needed medication and medical care, and seeks $12,000,000.00 in actual and punitive damages from defendants.

II. Plaintiff's Motion for Reconsideration

On February 9, 2004, plaintiff filed a motion to appoint counsel. On February 25, 2004, the court entered an order ruling on various issues in plaintiff's case and denied plaintiff's motion for appointment of counsel. On March 26, 2004, plaintiff filed a motion asking the court to reconsider the decision to deny appointment of counsel. Plaintiff contends that Judge VanBebber, who was presiding over this case at the time the February 25, 2004 Order was entered, made a "questionable 'midnight' summary denial of the motion for counsel."

A. Legal Standard for Reconsideration

Pursuant to Local Rule 7.3, a party may file a motion asking a judge to reconsider an order made by that judge. However, the local rule specifies that "[m]otions seeking reconsideration of dispositive orders or judgment must be filed pursuant to Fed. R. Civ. P. 59(e) or 60." D. Kan. Rule 7.3(a). Motions for reconsideration "filed within ten days of the district court's entry of judgment . . . [are] treated as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e)." *Hatfield v. Bd. of County Comm'rs for Converse County*, 52 F.3d 858, 861 (10th Cir. 1995). However, motions filed outside the ten-day time period set for Rule 59(e) motions are examined under Rule 60(b). *United States v. Emmons*, 107 F.3d 762, 764 (10th Cir. 1997).

The court is without authority to extend the ten-day time period specified in Rule 59(e). *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1179 (10th Cir. 2000). Fed. R. Civ. P. 6(b); *see*

also Collard v. United States, 10 F.3d 718, 719 (10th Cir. 1993) ("Rule 6(b) expressly prohibits a trial court from extending the time to file [a Rule 59(e)] motion."). Rule 59 provides no exception to the ten-day rule.

Rule 60(b) specifies that a motion pursuant to this rule "shall be made within a reasonable time." Considering the timing of filing, 30 days after the court entered its February 25, 2004 Order, the court construes plaintiff's Motion for Reconsideration as a motion raised pursuant to Rule 60.

Rule 60 provides that:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b) (emphasis added). A district court has discretion to grant relief as justice requires under Rule 60(b). *Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000). However, such relief is considered "extraordinary" and should "only be granted in exceptional circumstances." *Id.* "A litigant shows exceptional circumstances by satisfying one or more of Rule 60(b)'s six grounds." *Van Skiver v. United States*, 952 F.2d 1241, 1243-44 (10th Cir. 1991); *Loum v. Houston's Rest., Inc.*, 177 F.R.D. 670, 671-72 (D. Kan. 1998). The court may not grant a Rule 60 motion where no basis for relief is provided. *See Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996) (noting that granting a Rule 60 motion without a basis for relief would be an abuse of the court's discretion).

A Rule 60(b) motion triggers consideration of the established policy in favor of final judgments. *United States v. Johnson*, 934 F. Supp. 383, 385 (D. Kan. 1996). "Not a substitute for a direct appeal, a rule 60(b) motion addresses matters outside the issues on which the judgment was entered." *Nutter v. Wefald*, 885 F. Supp. 1445, 1450 (D. Kan. 1995) (citing *Brown v. McCormick*, 608 F.2d 410, 413 (10th Cir. 1979)). "It is not the opportunity for the court to revisit the issues already addressed in the underlying order or to consider arguments and facts that were available for presentation in the underlying proceedings." *Nutter*, 885 F. Supp. at 1450 (citing *Van Skiver*, 952 F.2d at 1243).

B. Discussion

Plaintiff has asked the court to reconsider its decision to deny him appointed counsel. Plaintiff claims that he is both physically and mentally impaired, and that Judge VanBebber did not articulate particular findings regarding why the motion to appoint counsel was denied. However, plaintiff has not satisfied any of the grounds which might justify relief under Rule 60(b). Moreover, in ruling on plaintiff's request for appointed counsel, Judge VanBebber noted that "[a] party in a civil action has no constitutional right to the assistance of counsel in the prosecution or defense of such an action" and cited *Durre v. Dempsey*, 869 F.2d 543, 647 (10th Cir. 1989). Judge VanBebber also noted that he considered the complexity of the issues raised and plaintiff's ability to state his claims and determined that appointment of counsel was not warranted. Because plaintiff has provided no basis for the relief he has requested under Rule 60(b), the court denies plaintiff's Motion for Reconsideration.

III. Plaintiff's Motions for Default Judgment

On May 6, 2004, and June 17, 2004, plaintiff filed separate motions asking the court to enter default judgment against all defendants in the above-captioned matter. In support, plaintiff asserts that defendants have failed to timely answer or to otherwise respond to his complaint as directed by federal procedural rules and orders of the court.

Plaintiff's motions requesting the court to enter default judgment against defendants in this action are not yet ripe for the court's review. In order to request default judgment, plaintiff must follow a two step process. First, he must have default entered on the record. Only following the entry of default is plaintiff

entitled to move for judgment by default. Fed. R. Civ. P. 55; *Koch Eng'g Co. v. Currieo*, 1989 WL 39501, *1 (D. Kan. March 20, 1989). Default as to defendants has not been entered in this case.

Even if plaintiff applied for entry of default against defendants pursuant to Fed. R. Civ. P. 55, the court would deny plaintiff's request for default judgment. Plaintiff filed his complaint on June 30, 2003, and defendants were not served with the complaint until March 2004. On May 3, 2004, the court entered an order extending the time for defendants to answer or to otherwise respond to plaintiff's complaint to May 31, 2004. Accordingly, defendants were required to answer or to otherwise respond to plaintiff's complaint on or before June 1, 2004, as the May 31, 2004 deadline fell on a legal holiday, thus extending defendants' deadline by one day. *See* Fed. R. Civ. P. 6(a). On June 1, 2004, defendants McCollum, Tharp, and Hershberger filed a motion to dismiss plaintiff's complaint. The same day, defendants filed a Suggestion of Death as to defendant N.L. Conner, pursuant to Fed. R. Civ. P. 25(a)(1). The court finds all defendants have timely answered or otherwise responded to plaintiff's complaint.

Accordingly, because the issue of entering default judgment is not properly before the court, and, based on the court's finding that all defendants have timely answered or responded to plaintiff's complaint, the court hereby denies both of plaintiff's motions for entry of default judgment.

IV. Defendants' Motion to Dismiss, and Plaintiff's Motion for Hearing, Motion to Strike, and Motion for Sanctions

Defendants contend that plaintiff's complaint should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Specifically, defendants contend that plaintiff has failed to exhaust his administrative remedies under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). Plaintiff contends that he has exhausted all available administrative grievance procedures, and that he should not be required to file futile appeals of the grievance decisions.

A. Plaintiff's Motion for Evidentiary Hearing and Motion to Strike and for Sanctions

As a preliminary matter, the court notes that, following defendant's filing of their reply brief on the motion to dismiss, plaintiff filed a Motion for Evidentiary Hearing (Doc. 44) and a Motion to Strike Defendants' Reply (Doc. 45). Within his motion to strike, plaintiff also requested sanctions against

defendants for filing the reply brief, claiming that the court's June 16, 2004 order with regard to scheduling voided defendants' motion to dismiss and that defendants filed the reply brief to harass plaintiff and waste the resources of plaintiff and the court.

With regard to plaintiff's motion for an evidentiary hearing, the court denies plaintiff's motion. The parties have fully briefed their arguments with regard to defendants' motion to dismiss, and the court does not believe an evidentiary hearing is warranted at this point in the litigation.

With regard to plaintiff's motion to strike and request for sanctions, the court first notes that defendants' filing of the reply brief was not improper. The court's June 16, 2004 Order did not void defendants' motion to dismiss. Defendants' motion to dismiss is properly before the court, and defendants' filing of a reply brief was acceptable practice in this district pursuant to Local Rule 7.1(c). The court next notes that the bulk of plaintiff's motion to strike is a response to defendants' arguments made in its reply brief. Thus, the court will treat plaintiff's arguments in his motion to strike as a sur-reply to defendants' motion to dismiss and will disregard the portions of the motion that do not directly address defendants' arguments in the reply brief.

For the reasons set forth above, the court finds that defendants' filing of the reply brief was proper and appropriate practice and does not warrant an order of sanctions. The court therefore denies plaintiff's motion to strike and request for sanctions in its entirety.

B. Facts Relevant to Defendants' Motion to Dismiss

The Bureau of Prisons (BOP) maintains and tracks information related to administrative complaints and appeals filed by inmates under the Bureau Administrative Remedy Program in a national database called SENTRY. The system allows for a computerized search of complaints and appeals. The hard copies of the actual administrative remedy files are maintained for a period of three years and then destroyed. At all phases of the administrative remedy process, paper copies of the appeal documentation are returned to the inmate, along with the agency response.

In his complaint, plaintiff claims that the filing of Administrative Remedy Requests (ARR) 287938, 290548, 291851, and 297513 support the allegations of his complaint.

Plaintiff filed ARR 287938 at the institutional level on January 15, 2003, requesting issuance of seizure medication. According to the SENTRY records, ARR 287938 was responded to on January 24, 2003. Plaintiff contends that he still has not received the response to ARR 287938. Defendants contend that plaintiff did not appeal ARR 287938. Plaintiff contends he appealed the request on March 3, 2003, by filing ARR 292312 at the regional level, but that the appeal was denied because he allegedly did not attach the appropriate paperwork. Plaintiff also contends that, because the response to ARR 287938 was not delivered to him, he could consider it as a denial and proceed to the next level of grievance. According to the SENTRY records, ARR 292312 was rejected at both the regional and national level because plaintiff did not provide a copy of the Warden's response to the original ARR that lead to his appeal. On both occasions, plaintiff was given 15 days in which to resubmit the appeal. When ARR 292312 was rejected at the national level, the response informed plaintiff that ARR 287938 was answered on January 24, 2003.

Plaintiff filed ARR 290548 at the institutional level on February 14, 2003, regarding medical issues. ARR 290548 was rejected the same day because of plaintiff's failure to file the correct number of attachments or the proper number of continuation pages. Plaintiff contends he did not receive the response until June 13, 2003, even though it should have been delivered to him by April 2, 2003. According to the SENTRY records, plaintiff neither re-filed nor appealed the rejection of ARR 290548.

Plaintiff filed ARR 291851 at the institutional level on March 3, 2003, again regarding medical issues. ARR 291851 was rejected the same day because plaintiff provided insufficient information about the request to permit its consideration. Again, plaintiff contends he did not receive the response to this request until June 13, 2003, even though it should have been delivered to him by April 2, 2003. According to the SENTRY records, plaintiff neither re-filed nor appealed the rejection of ARR 291851. Plaintiff contends that, on April 16, 2003, with regard to both requests 291851 and 290548, he attempted to proceed to the next level of grievance, but that prison staff refused to provide him with the appeal forms because he did not have the responses to those grievances to attach to his appeal.

Plaintiff filed ARR 297513 at the regional level on April 28, 2003, regarding a denial of medical care. ARR 297513 was rejected the same day because plaintiff failed to attempt informal resolution of the

complaint and failed to file a complaint at the institutional level. Plaintiff contends that he still has not received the response to this request. According to the SENTRY records, plaintiff neither re-filed nor appealed ARR 297513. Plaintiff contends he appealed the request, but the appeal was denied because he allegedly did not attach the appropriate paperwork.

In response to defendants' motion to dismiss, plaintiff contends that he exhausted all available administrative remedies before filing his complaint. Plaintiff further contends that the court, by granting him *in forma pauperis* status and by initially dismissing only U.S.P. Leavenworth Hospital as a defendant, has considered the merits of his claim and determined that plaintiff has stated a claim upon which relief may be granted - thereby determining that plaintiff has complied with the PLRA. Plaintiff contends that if his complaint had not stated a claim upon which relief could be granted, the court would have been forced to deny his application to proceed *in forma pauperis*.

C. Legal Standard for 12(b)(6) Motion to Dismiss

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

The court is aware that plaintiff in this case appears pro se. Accordingly, while the court should liberally construe a pro se plaintiff's complaint, "the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations." *Northington v. Jackson*, 973 F.2d 1518, 1521 (10th Cir. 1992).

The court notes that, in making its ruling on defendants' Motion to Dismiss, it has considered the SENTRY records that defendants attached as exhibits to their Motion to Dismiss. Normally, the court does not look beyond the complaint itself (and its attachments) when ruling on a 12(b)(6) motion. *See Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 960 (10th Cir. 2001). However, "it is accepted practice, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *Id*.; *see also MacArthur v. San Juan County*, 309 F.3d 1216, 1221 (10th Cir. 2002). Plaintiff does not dispute the authenticity of the SENTRY records submitted by defendants, and plaintiff's claims are indisputably premised on the grievance proceedings and records. In this situation, the court may consider the SENTRY records without converting defendants' Motion to Dismiss into a request for summary judgment under Fed. R. Civ. P. 56. *Id.*

D. Discussion

The PLRA requires a prisoner to exhaust available administrative remedies before filing an action with respect to prison conditions under § 1983. 42 U.S.C. § 1997e(a); *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002). "An inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim under PLRA for failure to exhaust administrative remedies." *Id*. Plaintiff claims that exhaustion would be futile because he does not believe that prison officials would effectively assist him during the process, and he claims these officials have taken inordinate amounts of time answering his grievances or have not answered them at all. However, the Supreme Court has not included "futility or other exceptions" into the PLRA's exhaustion requirement. *See Booth v. Churner*, 532 U.S. 731, 741 & n.6 (2001). "Congress ha[s] eliminated both discretion to dispense with administrative exhaustion and the condition that it be 'plain, speedy, and effective.'" *Jernigan*, 304 F.3d at 1032 (quoting *Booth*, 532 U.S. at 739). In fact, the Supreme Court has rejected futility arguments. *See Booth*, 532 U.S. at 740-41 & n.6; *Jernigan*, 304 F.3d at 1032-33.

Plaintiff must also demonstrate that all prison grievance complaints covered by his action have been administratively exhausted. If plaintiff includes any unexhausted claims in his action, the court must dismiss the entire action for failure to completely exhaust administrative remedies. *See Steele v. Fed. Bureau of Prisons*, 100 Fed. Appx. 773, 775, 2004 WL 1240901 at *2 (10th Cir., June 7, 2004) (holding that "unless all available remedies are exhausted for all of the claims in a *Bivens* action, the action must be dismissed") (citing *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004)).

The BOP has a four-step procedure for addressing inmate grievances. The first step is informal resolution with the prison's staff. 28 C.F.R. § 542.13. The second step is a written Administrative Remedy Request to the Warden. *Id*. §§ 542.13, 542.14. If the prisoner is not satisfied with the Warden's response at the second step, the third step is an appeal to the Regional Director. *Id*. § 542.15(a). If still unsatisfied with the response, the prisoner may appeal directly to the Office of the General Counsel in Washington, D.C. *Id*. Each step of the grievance process contains limits on time for filing grievances and appeals, and time limits on responses to the grievances.

In this case, plaintiff points to four administrative grievances, ARRs 287938, 290548, 291851, and 297513, that support his claims. Plaintiff claims that he has fully exhausted all administrative remedies available to him with regard to the four grievances. The court disagrees. At least three of the grievances, ARRs 290548, 291851, and 297513, were rejected because plaintiff failed to submit the proper documentation and information or to follow the BOP's procedures for filing the grievances. Plaintiff admits that he finally received the responses rejecting ARRs 290548 and 291851 on June 13, 2003, but that he never appealed them or re-filed them once he received the responses notifying him of the deficiencies. Moreover, with regard to ARR 287938, and its companion appeal, ARR 292312, plaintiff again failed to follow proper procedures in appealing the response, or lack of response.

In fact, the allegations contained in plaintiff's complaint, his memorandum in support of his complaint, and its numerous exhibits in support do not support plaintiff's contention that he exhausted his administrative remedies with regard to the four ARRs on which his claims rely. Plaintiff did not complete the BOP's four-step grievance procedure with regard to any of the ARRs at issue. As a result, the court finds that plaintiff

has not totally exhausted his administrative remedies with regard to any of the four grievances, and thus plaintiff has failed to state a claim upon which relief can be granted. *See Ross*, 365 F.3d at 1190. Accordingly, dismissal of plaintiff's entire complaint, without prejudice, is appropriate.

With regard to plaintiff's argument that the court deemed plaintiff to have met the administrative exhaustion requirement when it granted plaintiff's motion to proceed *in forma pauperis* in the case, the court finds plaintiff's argument unpersuasive. The court granted plaintiff's request to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) after considering plaintiff's financial records and plaintiff's affidavit, in which plaintiff stated that he believed he was entitled to relief for his claims. Moreover, pursuant to 28 U.S.C. § 1915(e)(2)(B), the court shall dismiss plaintiff's case at any time if the court determines that the action fails to state a claim upon which relief may be granted, which is precisely the determination the court has made in this case.

IT IS THEREFORE ORDERED that plaintiff's Motion for Reconsideration (Doc. 19), Motion for Default Judgment (Doc. 23), Motion for Default Judgment (Doc. 33), Motion for Hearing (Doc. 44), Motion for Sanctions (Doc. 45), and Motion to Strike Defendant's Reply to Motion to Dismiss (Doc. 45) are denied.

IT IS FURTHER ORDERED that defendants' Motion to Dismiss (Doc. 30) is granted. This case is hereby dismissed without prejudice.

Dated this 23rd day of September 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge